80-1475

Office-Supreme Court, U.S.
FILED
FEB 26 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, Respondent

v.

MARY C. HORTON, Petitioner
DONALD GEORGE HORTON, Petitioner

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

PHILLIP M. MARGOLIN
610 S.W. Alder St., #555
Portland, OR 97205
(503) 248-0731
Attorney for Petitioner Donald G. Horton

JOHN S. RANSOM
621 S.W. Morrison St., #330
Portland, OR 97205
(503) 228-0487
Attorney for Petitioner Mary C. Horton

I. QUESTIONS PRESENTED

A. The Hearing at the Ninth Circuit Court of Appeals

1. Were petitioners denied due process of law at the United States Court of Appeals for the Ninth Circuit when, during oral argument, one judge on the three-judge panel hearing petitioners' case acted in a rude, intemperate, and unjudicial manner that, at the very least, gave the appearance of bias?

2. Is remand for rehearing before the Ninth Circuit Court of Appeals required because the tapes of oral argument, which were requested by petitioners to substantiate the claims made above, are "unavailable"?

B. The Search and Seizure Issues

1. Is a defendant entitled to a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978) when the affiant omits

material information from the affidavit for a search warrant which, if included, would abrogate the existence of probable cause?

2. Are the doctrines (1)" * * * [A]ffidavits for search warrants must be interpreted in a common sense fashion * * *" and (2) a search may be upheld if " * * * the nexus between the items to be seized and the place to be searched rest[s] not on observation * * * but on the type of crime * * *" sufficient, in and of themselves, to establish probable cause?

3. Did the search warrant in the case at bar provide probable cause to believe that there was cocaine at petitioners' residence and, if it did, how much cocaine could reasonably be believed to be at the residence?

4. Did the search warrant for petitioners' residence become stale after

the seizure of the quantity of cocaine negotiated for between petitioner and agents of the Drug Enforcement Administration miles from the residence, prior to executing the warrant?

5. Did exigent circumstances permit a warrantless search of the residence?

II. TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED . . .	i
	A. The Hearing at the Ninth Circuit Court of Appeals	i
	B. The Search and Seizure Issues	i
II.	TABLE OF CONTENTS	iv
III.	TABLE OF AUTHORITIES . .	vii
IV.	OPINION BELOW	1
V.	JURISDICTIONAL GROUNDS .	4
VI.	CONSTITUTIONAL PROVISIONS	4
VII.	STATEMENT OF FACTS . . .	4
	A. The Search and Seizure	4
	B. The Oral Argument at the United States Court of Appeals . .	12
	C. The Transcript of Oral Argument	15
VIII.	MANNER IN WHICH CONSTITUTIONAL ISSUE WAS RAISED .	16
	A. The Search and Seizure Issues . . .	16
	B. The Due Process Issue	18

		Page
IX.	REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED	19
	A. The Hearing at the Ninth Circuit Court of Appeals	19
	B. The Unavailability of the Tapes of Oral Argument Before the Ninth Circuit Denies Petitioners Due Process of Law	24
	C. The Search and Seizure Issues	27
X.	CONCLUSION	44

Appendix

Memorandum	A-1
Order	A-3
Findings and Recommendations . .	A-4
Statement of Evidence and Proceeding Made Because No Transcript Available	A-11
Letter to U.S. Court of Appeals, from John S. Ransom, 11/04/80	A-15
Letter to John S. Ransom from U.S. Court of Appeals, 11/10/80	A-16

Page

Appellee's Statement of Objection or Proposed Amendment Pursuant to Federal Rule of Appellate Procedure 10(c). . . A-17

Affidavit for Search Warrant . . A-20

III. TABLE OF AUTHORITIES

Page

Case Cites

Commonwealth v. Fiore, ___ Mass App ___, 403 NE2d 953 (1980). . 33

Cruse v. State, 584 P2d 1141 (Alaska, 1978) 33

Franks v. Delaware, 438 US 154 (1978) i,29,30, 31,32, 33,34, 35

In Re Murchison, 349 US 133 (1955) 20,23

Nicodemus v. Chrysler Corp., 596 F2d 152 (CA 6, 1979) 22

Payton v. New York, ___ US ___, 63 L Ed 2d 639 (1980) 37

Roberts v. Bailar, 625 F2d 125 (CA 6, 1980) 22

State v. Meighan, 173 N.J. Super. 440, 414 A2d 576 (1980) 33

United States v. Brown, 539 F2d 467 (CA 5, 1976) 23

United States v. Cardall, 550 F2d 604 (CA 10, 1976), cert. den. 434 US 841 (1977) 19

Page

United States v. Davis, 617 F2d 677 (CA D.C., 1979) 32

United States v. Dubrofsky, 581 F2d 208 (CA 9, 1978) 41

United States v. Esparza, 546 F2d 841 (CA 9, 1976) 34

United States v. Feldman, 366 F Supp 356 (D. Hawaii, 1973). . 37

United States v. Gigix, 605 F2d 507 (CA 10, 1979) 21

United States V. House, 604 F2d 1135 (CA 8, 1979), cert. den. 445 US 931 (1980) 32

United States v. Knox, 456 F2d 1024 (CA 8, 1972) 27

United States v. Lazar, 347 F Supp 223 (D.C. Pa., 1972) . . 37

United States v. Lefkowitz, 618 F2d 1313 (CA 9, 1980), cert. den., ___US___, 66 L Ed 2d 27 (1980) 33

United States v. Lucarz, 430 F2d 1051 (CA 9, 1970) 39

United States v. Martin, 615 F2d 318 (CA 5, 1980) 32

United States v. Melvin, 596 F2d 492 (CA 1, 1979) cert. den., 444 US 837 (1979) 32

	Page
United States v. Spearman, 532 F2d 132 (CA 9, 1976)	39,40 41,42
United States v. Trott, 421 F Supp 550 (D.C. Del., 1976)	40
United States v. Vazquez, 605 F2d 1209 (CA 2, 1979)	32
United States v. Ventresca, 380 US 102 (1965)	38,39, 41,42, 43
Statutes	
28 U.S.C. 455(a)	21
28 U.S.C. 1254(1)	4
Constitutional Provisions	
United States Constitution, Amendment IV	4,27
United States Constitution, Amendment V	4
Miscellaneous	
Federal Rules of Appellate Procedure, Rule 10(c)	25

IV. OPINION BELOW

Petitioners were charged by a six-count indictment with one count of conspiracy to distribute cocaine, 21 U.S.C. §§ 841(a)(1) and 846, three counts of distribution of cocaine, 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2, one count of possession of cocaine with intent to distribute, 21 U.S.C. § 841, and one count of possession of marijuana with intent to distribute, 21 U.S.C. § 841(a)(1).

On February 5, 1980, petitioner Donald George Horton waived indictment and was charged in a single-count information with possession of cocaine with intent to distribute, 21 U.S.C. § 841. A plea of not guilty was entered, petitioner waived jury trial, and the case was submitted to Judge Belloni on stipulated facts. On March 21, 1980, Judge Belloni found defendant Donald Horton not guilty of possession

with intent to distribute and guilty of possession of cocaine. On May 5, 1980, petitioner Donald Horton was sentenced to a term of imprisonment of one year and fined $5,000. The prior indictment against Mr. Horton was dismissed.

On February 6, 1980, petitioner Mary Horton waived a jury and, pursuant to an agreement with the United States, submitted stipulated facts to Judge Belloni on Counts V and VI of the indictment for trial. On February 7, Judge Belloni found her guilty on both counts. On March 31, 1980, she was sentenced on Count V to five years imprisonment, followed by three years special parole term and on Count VI imposition of sentence was suspended and she was placed on five years probation, which probation is to commence on the termination of the special parole term with the special

condition that she pay a fine of $5,000.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. On November 3, 1980, petitioners' case was argued before that court. On November 14, 1980, in a MEMORANDUM decision, the lower court judgments against petitioners were affirmed. United States v. Mary C. Horton and Donald George Horton, CA Nos. 80-1225, 80-1324 [App.,A-1]

After receiving the decision of the Court, petitioners filed a PETITION FOR REHEARING and SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC. On December 29, 1980, the United States Court of Appeals for the Ninth Circuit filed an ORDER denying the Petition for Rehearing and rejecting the Suggestion for a Rehearing En Banc. [App., A-3]

V. JURISDICTIONAL GROUNDS

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

VI. CONSTITUTIONAL PROVISIONS

This petition raises questions involving the Fourth and Fifth Amendments to the United States Constitution:

> AMENDMENT IV: "The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."
>
> AMENDMENT V: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

VII. STATEMENT OF FACTS

A. The Search and Seizure

On July 17, 1979, at 1475 S.E. Kane, Roseburg, Oregon, petitioners' residence, Mary Horton furnished Special

Agent Bishop of the Drug Enforcement administration (D.E.A.) an ounce of cocaine. [RT. 26-27, 42, Ex. 1]

On October 28, 1979, Agent Bishop phoned Mary Horton and asked her to supply him with two ounces of cocaine. Mrs. Horton told the agent that she would have to obtain that amount from another source. [RT. 39-40] Later that day, Mrs. Horton was surveilled leaving her residence. She was not under constant surveillance during the trip from her residence to the Windmill Restaurant. [RT. 81-82] At the restaurant, Agent Bishop entered her car and the two proceeded to the Roseburg Airport where Agent Bishop purchased two ounces of cocaine from Mrs. Horton. [RT. 107; Ex. 1]

On November 16, 1979, Mary Horton offered eight ounces of cocaine

to Agent Bishop and said it would have to be purchased immediately or it would not be available. [RT. 43, 45]

On November 20, 1979, Mary Horton was asked if she could get 20 ounces of cocaine and she replied, "'bout all I could do is 12." [RT. 367; Ex. 3] On November 21, 1979, Mary Horton asked Bishop when he was arriving in Roseburg so she could inform certain people. [RT. 370; Ex. 3] She told Bishop she did not have cocaine, but could obtain it. [RT. 40-41] The day before she had talked about 12 ounces, but on November 21, she said, " * * * Now there, uh * * * there's a * * * I think it would be 14." [RT. 373]

At 1:06 p.m. on November 21, 1979, Judge Poole of Roseburg issued a search warrant authorizing the search of

the residence for cocaine, records of sales or purchases of cocaine, and drug paraphernalia. [RT. 89-91; Ex. 1] The affidavit in support of the warrant [App.,A-20] was prepared by John Hodgson of the Roseburg Police Department. The affidavit contained only the following information:

1. A statement that John Hodgson had been a police officer with the Roseburg Police Department for four and one-half years;

2. A statement that Officer Hodgson believed that Mary Horton had cocaine, records of sales or purchases of cocaine, and drug paraphernalia concealed in the residence;

3. A statement that Officer Hodgson believed that cocaine, records, and paraphernalia would be found at the residence because:

a. A D.E.A. agent had purchased one ounce of cocaine from Mary Horton at the residence on August 17, 1979;

b. A D.E.A. agent had purchased approximately two ounces of cocaine from Mary Horton on October 28, 1979, at the Roseburg Airport, and Mary Horton had been observed to drive to the airport directly from her residence and return from the airport directly to her residence;

c. On November 20, 1979, a D.E.A. agent had called Officer Hodgson and told him that he had arranged to purchase approximately 12 ounces of cocaine from Mary Horton on November 21, 1979;

d. On November 21, 1979, this D.E.A. agent told Hodgson that he had spoken with Mary Horton and had arranged to meet her at a restaurant at approximately two o'clock when 14 ounces of

cocaine would be exchanged.

4. A statement by Officer Hodgson describing the residence at 1475 S.E. Kane.

Prior to the time that the search warrant was obtained, Richard Wisenor, the D.E.A. agent in charge of the investigation, along with the other law enforcement personnel participating in the investigation, determined that the search warrant would not be executed until after Mary Horton was arrested at the Roseburg airport and the 14 ounces of cocaine were seized from her. This fact was never placed in the affidavit or communicated to Judge Poole. [Ex. 1] Other information, such as the fact that Mary Horton was a middle person who obtained her cocaine from other individuals, was also not communicated to the Judge or placed in the affidavit. [id]

Nowhere in the affidavit, save for a conclusory sentence which states that Officer Hodgson believes that drug paraphernalia and drug records will be found in the residence, is there any mention of drug records or drug paraphernalia having been observed in the residence or any statement concerning Officer Hodgson's experience, or the experience of any other individual involved with narcotics activity, that it is common for drug records or drug paraphernalia to be in the residence of an individual who is alleged to deal narcotics in the manner and quantity that Mary Horton was alleged to be dealing narcotics.

At approximately 3:45 p.m., Mary Horton met Agent Bishop at the Roseburg Airport and gave him 14 ounces

of cocaine. [RT. 29, 32] She told Bishop that she had held back some of the cocaine for her own use. [RT. 29] The amount she held back was small. [RT. 41] Agent Bishop assumed the amount was an ounce. [RT. 41] An ounce is like a pile of powder one inch in diameter and three quarters of an inch high. It is small enough to be kept on a person, in a purse, or in a car glove compartment. Bishop had no idea where Mary Horton was keeping the small amount of cocaine or if she still had it. [RT. 44-45] The conversation concerning the amount held back was such that it could be interpreted to mean that the small quantity had already been consumed. [Ex. 4]

After the agents arrested Mary Horton and took the cocaine, they went to the residence, arriving at 4:30.

[RT. 57] As of 12:00 noon, November 21, it was known to D.E.A. agents that Magistrate Hogan was in Roseburg. [RT. 175-176] Agent Wright told Agent Wisenor that Magistrate Hogan was in town. [RT. 80] A new warrant could have been obtained easily. [RT. 183-187] However, no attempt was made to get a new search warrant after Mary Horton was arrested and the 14 ounces of cocaine was seized, even though court was in session. [RT. 69]

The search of the Horton residence commenced at approximately 4:30 p.m. and lasted until 11:30 p.m. [RT. 174-175] Narcotics found at the residence during the search was the basis for the charges upon which petitioners were convicted.

B. The Oral Argument at the United States Court of Appeals

After petitioners were convicted, a Notice of Appeal was filed in

the United States Court of Appeals for the Ninth Circuit. On November 3, 1980, Phillip M. Margolin, attorney for petitioner Donald George Horton, and John S. Ransom, attorney for petitioner Mary C. Horton, appeared in Portland, Oregon, before Judges Kilkenny, Van Dusen, and Hug of the United States Court of Appeals for the Ninth Circuit to present oral argument in petitioners' case. [App.,A-11,12]

Mr. Margolin spoke first. He began to discuss the sufficiency of the affidavit. Halfway through a sentence he was interrupted by Judge Kilkenny, who stated, in a rude and angry manner, that the case presented the clearest example of probable cause he had ever seen. He then proceeded to state, in an irate manner that, "It is lawyers like you"

who clog the courts with frivolous appeals, or words to this effect. [App.,A-12]

Judge Kilkenny next harangued counsel for filing an appeal when "that woman is so guilty," or words to that effect. [App.,A-13] Mr. Margolin was not representing a woman. He represented Mr. Horton. This had been made clear to the court twice prior to the commencement of the substantive part of Mr. Margolin's argument. Additionally, since the issues before the court were strictly legal, the question of Mr. Horton's guilt or innocence was irrelevant.

Judge Kilkenny interrupted Mr. Margolin two or three more times before permitting him to complete his argument. [App.,A-13]

C. The Transcript of Oral Argument

On November 4, 1980, the day after oral argument, Mr. Ransom wrote the Court of Appeals to find out how he could get a transcript of the oral argument. [App.,A-15] The Court wrote Mr. Ransom on November 10, 1980, and told him that no transcripts of oral argument are made, but that he could listen to the tapes in the clerk's office in San Francisco. [App.,A-16]

Through a San Francisco law firm, Mr. Ransom arranged to have a stenographer listen to the tape and make a stenographic record of it for use in a Petition for Rehearing or a Petition for a Writ of Certiorari. The stenographer went to the clerk's office at the Ninth Circuit Court of Appeals in San Francisco. There, she was informed by a deputy clerk

that, "None of the tapes of the day of argument came out." "No tape is available." [App., A-14]

On November 14, 1980, the three-judge panel of the Ninth Circuit Court of Appeals affirmed petitioners' convictions. [App., A-1] A PETITION FOR REHEARING AND A SUGGESTION FOR REHEARING EN BANC was filed by petitioners. On December 29, 1980, the Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected. Judge Kilkenny abstained from voting and the other two members of the three-judge panel, Judges Hug and Van Dusen recommended rejection of the suggestion. [App., A-3]

VIII. MANNER IN WHICH CONSTITUTIONAL ISSUE WAS RAISED

A. The Search and Seizure Issues

Prior to trial, petitioners

filed motions to suppress evidence seized at the residence during a search made pursuant to a search warrant. On January 24 and 25, 1980, United States Magistrate heard argument concerning these motions and made recommendations and findings adverse to petitioners. Upon de novo review, the Honorable Robert C. Belloni denied the motions on February 5, 1980.

Petitioners were convicted by Judge Belloni and they filed an appeal to the United States Court of Appeals for the Ninth Circuit. The brief in petitioners' consolidated case, CA Nos. 80-1225, 80-1324, set out petitioners' reasons for believing that the Fourth Amendment to the United States Constitution was violated during the course of the search of the residence. These constitutional arguments were also raised

before United States Magistrate Hogan and United States District Court Judge Belloni.

B. The Due Process Issue

The question of whether or not petitioners were denied due process because of the conduct of one of the judges who sat on the three-judge panel that heard petitioners' appeal in the United States Court of Appeals for the Ninth Circuit was raised for the first time in petitioners' PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC. On page 3 of the PETITION FOR REHEARING, petitioners stated:

> "The comments were intemperate, irrelevant, and unnecessary. The language was unabated and suggested an opinion based on guilt rather than the issues raised. Regardless of the merits of an appeal, the appearance of a bias violated the due process rights of the defendant and requires a rehearing

before another panel. Cf. In Re Murchisen, 349 U.S. 133, 136 (1955)"

Additionally, with regard to the unavailability of the transcript, petitioners stated on page 4 of the PETITION:

> "* * * The unavailability of any recording or transcript restricts this argument, supra, and, of course, any response. It is unfair to all parties.
>
> "The unavailability of the recording presents the appearance of justice denied and requires a rehearing."

IX. REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Hearing at the Ninth Circuit Court of Appeals

1. Misconduct of the Judge Requires Remand

Charges of misconduct or prejudice leveled at a judge "* * * should not be lightly made and, once made, should not be casually treated by a reviewing court * * *" United States v.

Cardall, 550 F2d 604, 606 (CA 10, 1976) cert den. 434 U.S. 841 (1977). With this in mind, petitioners contend that the conduct of Judge John F. Kilkenny during oral argument before a three-judge panel of the Ninth Circuit Court of Appeals was rude, intemperate, and unjudicial to the point where it indicated, at the very least, an appearance of bias against petitioners and their counsel.

In In Re Murchison, 349 U.S. 133, 136 (1955), this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absense of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness * * * Circumstances and relationships must be considered. This Court has said, however, that '[e]very procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the state and the accused, denies the latter due

> process of law.' * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' * * *"

"Thus, if a judge's conduct or appearance in the trial of a case does not comport with the appearance of justice, the conviction must be reversed. Berger v. United States, 255 U.S. 22, 21 S. Ct. 230, 65 L. Ed 481 (1921); United States v. Brown, [539 F2d 467 (CA 5, 1976)] at 470 * * *" United States v. Gigix, 605 F2d 507, 510 (CA 10, 1979)

In two recent cases, the Sixth Circuit has reversed cases because the Court believed that a judge's conduct was the type which required the judge to recuse himself under the provisions of 28 U.S.C. 455(a), which states that, "Any

justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." See Roberts v. Bailar, 625 F2d 125 (CA 6, 1980); Nicodemus v. Chrysler Corp., 596 F2d 152 (CA 6, 1979).

During oral argument, petitioner George Horton's counsel introduced himself as counsel for George Horton, a male. Despite this, Judge Kilkenny harangued petitioner George Horton's counsel for filing a brief "when that woman is so guilty" or words to that effect. [App., A-13] No issues of guilt or innocence were raised on appeal. Only legal issues regarding the validity of the search of petitioners' residence were before the court.

George Horton's attorney had never met Judge Kilkenny, except on a few

occasions when he had argued before him at the Court of Appeals, yet the judge made a personal attack on counsel stating that, "It is lawyers like you who clog the courts with frivolous appeals" or words to that effect.

Citing In Re Murchison, supra, the Fifth Circuit, in United States v. Brown, 539 F2d 467, 469 (CA 5, 1976) stated:

> "The truth pronounced by Justinian more than a thousand years ago that 'Impartiality is the life of justice' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and affect the measure of its judgments. If the judge finds himself possessed of those sentiments, he should recuse himself; or, if he does not, confront the likelihood of proceedings under the statute[5] [28 U.S.C. § 144] to require him to do so. (Footnote omitted)"

In this case, at the very least, Judge Kilkenny's tirade presents an appearance of bias. Petitioners have no idea why Judge Kilkenny was so insensed about their case. But no judge who gets as angry about a law case as Judge Kilkenny did should sit on that case.

Petitioners did not get a fair hearing before Judge Kilkenny. The case should be remanded for rehearing before a new panel of the Ninth Circuit Court of Appeals.

B. The Unavailability of the Tapes of Oral Argument Before the Ninth Circuit Denies Petitioners Due Process of Law

The day after oral argument, petitioners wrote the clerk of the Ninth Circuit to find out how to get a transcript of Judge Kilkenny's remarks. [App., A-15] The clerk of the court informed them that, "No transcripts are made of oral argument

before the court. If you wish, you may listen to the tapes in the clerk's office in San Francisco, or have someone come into this office and transcribe the argument." [App.,A-16] Petitioners attempted to have a transcript made, only to have the stenographer who went to the court informed that "None of the tapes of the day of argument came out." "No tape is available." [App., A-14]

Rule 10(c) Federal Rules of Appellate Procedure, provides a method for providing an appellate court with a record of proceedings below when the transcript of the lower court proceeding has been lost. Petitioners have attempted to provide this court with a record of what occurred below by including with this Petition a STATEMENT OF EVIDENCE AND PROCEEDING MADE BECAUSE NO TRANSCRIPT

AVAILABLE, which was prepared by petitioners, and an APPELLEE'S STATEMENT OF OBJECTION ON PROPOSED AMENDMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 10(c), prepared by the Government. (Neither petitioners nor the Unied States is certain that 10(c) applies to a case brought before this Court.) However, petitioners do not believe that these documents are an adequate substitute for the now unavailable tapes of oral argument for two reasons: first, these written statements cannot provide the Court with the actual words used by Judge Kilkenny and the tone of voice in which they were said; second, there is some disagreement between the Government and petitioners as to what occurred. The unavailability of the tape of oral argument, regardless of the reason for the destruction,

denies petitioners due process. Petitioners simply cannot provide this court with evidence of the serious claims of misconduct that they have made without it.

The facts of this particular case require remand to the lower court in the interests of justice. See, United States v. Knox, 456 F2d 1024, 1025 (CA 8, 1972).

C. The Search and Seizure Issues

Petitioners contend that the provisions of the Fourth Amendment to the United States Constitution were violated by a search of their residence which turned up the evidence used against them at their trial. Whether or not the search was illegal depends on how this Court analyzes several separate search and seizure issues, two of which involve questions which have not been resolved by this Court.

1. The Omissions

In August, 1979, four months before the search of petitioners' residence, Mary Horton sold Agent Bishop one ounce of cocaine at her home. After that, the sales by Mary Horton to Agent Bishop followed a different pattern. Agent Bishop would negotiate with Mary Horton for a specific amount of cocaine which, it was clear, she was procuring from another individual. This pattern was followed on November 20 and 21, 1979, when Mary Horton agreed to get first 12, then 14, ounces of cocaine for Agent Bishop. It was clear that she was receiving this cocaine from someone else.

D.E.A. agents planned to arrest Mary Horton with the 14 ounces of cocaine at the Roseburg Airport before executing the search warrant for her residence. This plan had been worked out prior to

securing the search warrant for petitioners' residence.

The affidavit in support of the search warrant omitted the facts set out above. Prior to trial, petitioners' contended that the omission of these facts invalidated the search warrant. Petitioners based their argument on this Court's holding in Franks v. Delaware, 438 U.S. 151 (1978). In that case, this Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id at 155-156

Petitioners contended that the omissions from the search warrant invalidated the search warrant because the inclusion of the omitted facts would have negated probable cause. Since the D.E.A. agents could only expect to find, at the most, 14 ounces of cocaine in the house on November 21, the judge would not have been able to find probable cause to believe that the 14 ounces of cocaine would be in petitioners' residence at the time the search warrant was executed if the judge reviewing the affidavit knew that the agents were going to arrest Mary Horton and seize the 14 ounces of cocaine prior to executing the warrant.

The United States Magistrate denied petitioners' request for a hearing because he found that Franks was "distinguishable. Franks addresses the

issue of false statements knowingly and intentionally included in the affidavit, where such false statement was necessary to a finding of probable cause." [App., A-9] The magistrate then found that "[t]he omissions noted * * * were not necessary to a finding of probable cause." Id.

The trial court affirmed the magistrate's finding that a Franks analysis was not appropriate:

> "It is true that the Frank (sic) case teaches this, that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the affidavit, and if the allegedly false statement is necessary for finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. But that's not the case here. It's not even the allegation of the defendants who allege an omission not an inclusion. The omissions were not necessary to the finding of probable cause." [RT. 379-380]

The Court of Appeals misstated the issue in holding that "[t]he alleged omissions in (sic) the affidavit are immaterial." [App., A-2]

The holding of the lower courts in the case at bar to the effect that omissions are not covered by the Franks analysis is contrary to the holding of all the federal courts that have considered whether omissions from an affidavit for a search warrant should be handled in the same way as false statements included in a search warrant: United States v. Melvin, 596 F2d 492 (CA 1, 1979), cert. den., 444 U.S. 837 (1979); United States v. Vazquez, 605 F2d 1209 (CA 2, 1979); United States v. Martin, 615 F2d 318 (CA 5, 1980); United States v. House, 604 F2d 1135 (CA 8, 1979), cert. den. 445 U.S. 931 (1980); United States v. Davis, 617 F2d 677 (CA

D.C., 1979). Even the Ninth Circuit has assumed that the Franks analysis applies to omissions. United States v. Lefkowitz, 618 F2d 1313, 1317 n. 9 (CA 9, 1980) cert. den. ___U.S.___, 66 L. Ed. 2d. 27 (1980) Several state courts have also applied the Franks analysis to omissions. Cruse v. State, 584 P2d 1141 (Alaska, 1978); State v. Meighan, 173 N.J. Super. 440, 414 A2d. 576 (1980); Commonwealth v. Fiore, ___Mass. App.___, 403 N.E.2d. 953 (1980). In fact, petitioners were unable to find a single case decided after Franks which did not apply the Franks analysis to omissions. The opinions of the United States Magistrate and the District Court Judge in the case at bar are clearly contrary to the weight of authority.

The rationale behind the hearing requirement for material false statements

intentionally or recklessly included in an affidavit is equally applicable to material information omitted from an affidavit. In both cases, the purpose of obtaining an impartial decision from a detached magistrate is thwarted.

> "The affidavit must inform the magistrate of all the essential facts with sufficient clarity to enable him to exercise his independent judgment. * * * Half-truths and misrepresentations, as well as conclusory allegations, can reduce the function of a magistrate to that of a rubber stamp upon the law enforcement officers' personal determination of probable cause." United States v. Esparza, 546 F2d 841, 843 (CA 9, 1976)

The question of the applicability of Franks v. Delaware, 438 U.S. 154 (1978) to material information intentionally or recklessly omitted from an affidavit for a search warrant has not been addressed by this Court. The findings of the lower courts in this

case are contrary to authority in both the federal and state courts considering this issue. This Court should accept review to decide if "omissions" from an affidavit should receive the same consideration that Franks accorded to "false statements" in an affidavit.

The facts omitted from Officer Hodgson's affidavit were material. Had they been included, the judge would not have been able to find probable cause to search petitioners' residence for the 14 ounces of cocaine. Petitioners were entitled to a hearing under Franks v. Delaware.

2. Assuming that Omissions from the Affidavit Were Immaterial, Was There Probable Cause to Believe that Cocaine Could Be Found at the Residence?

Petitioners contend that even absent the omissions, the facts set out

in the affidavit did not provide probable cause to believe that cocaine would be found in the residence on November 21, 1979. The only statement in the affidavit that indicates that cocaine was ever seen in the Horton residence is a statement concerning the purchase of one ounce of cocaine four months prior to the search on August 17, 1979.

However, if the information in the affidavit did provide probable cause concerning cocaine, it is petitioners' contention that it provided probable cause only to believe that the 14 ounces of cocaine for which Agent Bishop negotiated would be at the residence. Aside from the one ounce purchased in her home in August, there is no evidence in the affidavit that would indicate that Mary Horton dealt in other than fixed amounts which she received from other people.

3. Staleness

Once the items specified in a search warrant have been found, it is improper for a search to continue. United States v. Lazar, 347 F. Supp. 223 (D.C. Pa., 1972); United States v. Feldman, 366 F. Supp. 356 (D. Hawaii, 1973). It is petitioners' contention that the warrant to search petitioners' residence for cocaine became stale once the 14 ounces of cocaine were seized from her at the Roseburg Airport.

4. No Exigent Circumstances Existed

No exigent circumstances existed to justify a warrantless search. It would have been easy to secure a new warrant. [RT. 80, 175-176, 183-187] The agents knew other people were at the residence when they secured the search warrant and did not get arrest warrants. Payton v.

New York, ___U.S.___, 63 L.Ed.2d. 639 (1980). Although Mary Horton stated that she had held back a small quantity of cocaine, there was no evidence that it was in the residence or even still in existence. [RT. 29, 41, 44-45; Ex. 4]

5. What Are the Outer Limits of the "Common Sense" and "Nexus" Doctrines?

In United States v. Ventresca, 380 U.S. 102, 108-109 (1965), this Court held:

> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informant's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based * * * Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should

> not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner * * * "

Several cases have cited Ventresca for the proposition that " * * * [A]ffidavits for search warrants must be interpreted in a common sense fashion * * *," United States v. Spearman, 532 F2d 132, 133 (CA 9, 1976). Another doctrine frequently quoted is the one that holds that a search may be upheld if " * * * the nexus between the items to be seized and the place to be searched rested not on direct observation * * * but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property * * *," United States v. Lucarz, 430 F2d 1051, 1055 (CA 9, 1970). These two doctrines

have been cited to buttress a finding that an affidavit in support of a search warrant was adequate to support the issuance of a warrant to search a residence for "drug records" or "drug paraphernalia", even though the affiant had not seen these items in the residence to be searched, or been told by an informant that these items would be in the residence. In these cases, the affiant usually states:

> "It is commonplace for dealers of heroin to have heroin that is packaged for sale in the place where they live or sell from in their vehicles or on their persons." United States v. Spearman, supra at 133.

In United States v. Trott, 421 F. Supp. 550, 554 (D.C. Del., 1976), a court found that an affidavit did contain probable cause to believe that records or ledgers would be found at Trott's residence. The court stated:

> " * * * The affidavit provides a reasonable basis for believing that Trott was a major distributor of drugs and that, on the basis of the affiant's personal experience, as well as that of other drug enforcement personnel, major drug dealers routinely keep ledgers or records of their transactions."

However, in United States v. Dubrofsky, 581 F2d 208, 212-213 (CA 9, 1978), the Ninth Circuit upheld the search of a defendant's residence for heroin and paraphernalia where, apparently, not even the type of statement found in the Spearman affidavit existed. The court quoted Ventresca for the proposition that "affidavits in support of a warrant, however, should be tested in a common sense and realistic fashion," id., and Spearman for the proposition that " * * * [A] warrant may be upheld where the nexus between the items to be seized and the place to be searched rests not upon direct

observation, but on the type of crime, nature of the items, and normal inferences where a criminal would likely hide contraband * * *." Id. The Ninth Circuit then held, "Heroin importers commonly have heroin and related paraphernalia where they live. Spearman, supra at 133" id. As petitioners read this case, the Ninth Circuit used one of its own appellate cases to provide probable cause--not anything found in the affidavit.

In the case at bar, we have a similar situation with regard to the "drug paraphernalia" and "drug records" search. The affidavit did not even mention the words "drug records" or "drug paraphernalia", except in the conclusory statement that the affiant believes that these items will be found at the residence. As previously stated, in Ventresca, supra

at 108-109, this Court held that probable cause could not be made out by affidavits which were purely conclusory, stating only the affiant's or an informant's belief that probable cause existed without detailing any of the underlying circumstances upon which the belief was based. Given the holding in Ventresca, the affidavit for this search warrant should fail with regards to "drug paraphernalia" and "drug records". This Court should accept review in this case in order to clarify the outer limits of the "common sense" and "nexus" doctrine. There is an alarming trend towards citing those doctrines to validate searches for items such as drug records and drug paraphernalia when the search is neither based on observation of the items nor a statement in the search warrant affidavit concerning the experience of the affiant with this type of item.

X. CONCLUSION

For the above stated reasons, petitioners pray that a Writ of Certiorari be issued to review the judgment rendered by the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Phillip M. Margolin
610 S.W. Alder, #555
Portland, OR 97205
(503) 248-0731
Attorney for Petitioner Donald G. Horton

John S. Ransom by V.L.
John S. Ransom
621 S.W. Morrison St., #330
Portland, OR 97205
(503) 228-0487
Attorney for Petitioner Mary C. Horton

FILED
NOV

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARY C. HORTON, Defendant-Appellant.	No. 80-1225
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONALD GEORGE HORTON, Defendant-Appellant.	No. 80-1324 D.C. No. CR 79-229 MEMORANDUM

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni, Presiding
Argued and Submitted November 3, 1980

Before: VAN DUSEN*, KILKENNY, and HUG, Circuit Judges.

Donald and Mary Horton were convicted of drug offenses. They urge on appeal that their motions to suppress evidence found at their residence were improperly denied. The Hortons argue (1) that the affidavit on which the warrant was based was insufficient to provide probable cause to search the residence for drugs, records of drug sales, and drug paraphernalia, (2) that the affidavit omitted important facts and thus the warrant was invalid under Franks v. Delaware, 438 U.S. 155 (1978), (3) that the warrant was stale following Mary Horton's arrest, and (4) that assuming the warrant was invalid for one of the reasons listed above, no exigent circumstances justified a warrantless search.

*Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

We find that the affidavit was sufficient to provide probable cause to search the residence for the items mentioned. United States v. Solario, 577 F.2d 554 (9th Cir. 1978). The alleged omissions in the affidavit are immaterial. United States v. Young Buffalo, 591 F.2d 506 (9th Cir.), cert. denied, 441 U.S. 950 (1979). The warrant was not stale following the arrest because the items listed in the warrant might reasonably have continued to be present in the house. Because the warrant was valid, we need not reach the issue whether exigent circumstances existed.

The judgments are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A-3

FILED

DEC 29 1990

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

RECEIVED

DEC 31 1980

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARY C. HORTON, Defendant-Appellant.	No. 80-1225
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONALD GEORGE HORTON, Defendant-Appellant.	No. 80-1324 D.C. No. CR 79-229 ORDER

Appeal from the United States District Court
for the District of Oregon

Before: VAN DUSEN*, KILKENNY, and HUG, Circuit Judges.

A majority of the panel in the above-entitled case has voted to deny the petition for rehearing. Judge Hug has voted to reject the suggestion for a rehearing en banc. Judge Van Dusen has recommended rejection of the suggestion for rehearing en banc and Judge Kilkenny abstains.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

vs. NO. CR 79-229

MARY CONCETTA HORTON, DONALD GEORGE HORTON, and JON HAMILTON RIGGS, FINDINGS AND RECOMMENDATION

Defendants.

An indictment was returned on November 28, 1979, charging defendants Mary Concetta Horton and Donald George Horton with conspiracy to distribute a substance which contained cocaine, a Schedule II narcotic drug, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment also charges defendants Donald and Mary Horton with possession with intent to distribute and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and with possession with intent to distribute marijuana, a Schedule I controlled substance in violation of 21 U.S.C. § 841(a)(1).

Relevant evidence including white powder alleged to be cocaine and vegetable matter alleged to be marijuana was seized from the premises of a house located at 1475 S. E. Kane Street, Roseburg, Oregon, by Special Agents of the Drug Enforcement Administration [DEA] and Roseburg police officers on November 21, 1979 at approximately 4:30 p.m. The house is the residence of defendants Donald and Mary

Horton and was searched pursuant to a warrant authorized by Douglas County District Court Judge Ronald Poole. The affiant in support of the warrant was Detective John Hodgson of the Roseburg Police Department.

Defendants move the court for an order suppressing all evidence seized during the above described search on several grounds.

Defendants contend that the search warrant was a constitutionally defective general warrant because it lacked reasonable particularity and certainty as to the identity of the records to be searched for and seized.[1] However, I find that the limiting phrase "of sales or purchases of cocaine" is sufficiently particular. Defendants also contend that there is no detailed list of documents relating to a specific crime to which the "records can be deemed limited to." In view of the facts cited in the affidavit that (1) one sale of cocaine by Mary Horton to a government agent occurred at 1475 S. E. Kane on August 17, 1979; (2) a second sale of cocaine by Mary Horton to a government agent occurred with supporting surveillance of Mary Horton leaving the residence, delivering the cocaine, and returning immediately to the residence on October 28, 1979; (3) a third large sale of cocaine by Mary Horton which had been negotiated by Mary Horton over the telephone was expected to occur on November 21, 1979; and (4) the quantity of cocaine involved in the above described sales was apparently more than would be retained for personal use; I find that the warrant specified what was to be searched for and seized with sufficient particularity. Common sense would dictate that those things named in the warrant (i.e. drugs, drug paraphernalia and records of drug sales) would be found at the home of an

1. The warrant authorizes a search for "Cocaine, records of sales or purchases of cocaine, drug paraphernalia . . . on the premises known as 1475 S. E. Kane . . ."

apparent drug dealer selling and delivering large quantities of drugs out of home on a repeated basis.

Defendants also contend that the affidavit in support of the search warrant fails to set forth facts sufficient to demonstrate the constitutionally required probable cause to believe that items subject to seizure would be found at the residence. Defendants note that there were no observations of any specific activity relating to documents in the house by any law enforcement officers and that all of the observations set forth in the affidavit related to sales, and conclude that there were insufficient underlying circumstances from which a judge could conclude that records and other items subject to seizure would be found in the house.

Defendants concede that "in determining whether an affidavit is sufficient to support a warrant, we look only to the information on the face of the document . . . interpreting it in a 'commonsense and realistic fashion.'" United States v. Solario, 577 F.2d 554, 555 (9th Cir. 1978); United States v. Ventresca, 85 S.Ct. 741 (1965). Probable cause is shown where the affidavit sets forth facts and circumstances sufficient to warrant a man of reasonable caution to believe that the items sought in the search are located at the premises to be searched. See Berger v. New York, 87 S.Ct. 1873 (1967).

In the case at bar, the judge authorizing the warrant had before him the above described information. A magistrate interpreting these facts and circumstances in a "commonsense and realistic fashion" and indulging commonsense inferences could reasonably conclude that the items named in the warrant would be found at 1475 S. E. Kane Street. A magistrate's determination that probable cause exists should be given great deference. Spinelli v. United States, 89 S.Ct. 584 (1969).

Defendant Donald Horton concedes that the search warrant affidavit provides probable cause to believe that fourteen ounces of cocaine would be in the residence on November 21, 1979, but contends that the warrant was stale after Mary Horton was arrested and that the search was therefore illegal because probable cause to believe that cocaine would be at the residence no longer existed at the time the warrant was executed. Defendant Donald Horton contends that the affidavit provided no information that a quantity of cocaine greater than that transferred to DEA Agent Bishop would be in the residence and that once the cocaine was transferred to Agent Bishop, probable cause to search for cocaine at the residence ceased to exist and the search became illegal.

Exigent circumstances may alleviate the requirements of the Fourth Amendment. United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978); cert. denied, 99 S.Ct. 119 (1979). I find that the search warrant was not unconstitutionally stale. However, the record reveals that the following circumstances existed at the time the search warrant was executed, and, assuming arguendo that the search warrant became stale at the time of Mary Horton's arrest, these facts obviated the necessity of obtaining a supplemental or amended search warrant.

1) Prior to the purchase by Agent Bishop on November 21, 1979, Mary Horton had indicated that she was waiting for her source to furnish her the drugs later that day. At the time of her arrest she told officers that her source was an unnamed person from Eugene. A very large sum of money was to be paid for the cocaine.

2) At the time of the delivery of the cocaine and the arrest on November 21, 1979, Mary Horton indicated that she had saved an ounce of cocaine for herself.

3) Mary Horton had stated on earlier occasions that more than one person was involved in the cocaine transactions and surveillance on November 21, 1979 revealed that other persons were at her residence.

4) Mary Horton offered Agent Bishop the opportunity to purchase eight ounces of cocaine in a November 16, 1979 phone conversation from her residence.

5) Surveillance of Mary Horton on October 28, 1979 indicated that she left her house, delivered drugs to Agent Bishop, and returned immediately to her home.

6) Mary Horton offered cocaine to Agent Bishop on an onyx slab for his use in her residence on August 17, 1979.

7) Mary Horton sold cocaine to Agent Bishop in her home on August 17, 1979.

The agents therefore had reasonable grounds to believe that the supplier of drugs to Mary Horton or other persons might be at the house and that if Mary Horton did not promptly return, persons in the house might suspect that she had been arrested and then destroy contraband and other evidence. In addition, it was about 4:00 p.m. when Mary Horton was arrested and it would have been questionable whether a supplemental search warrant could have been obtained that day. Even if a supplemental search warrant could have been obtained, it was reasonable to believe that evidence could have been removed or destroyed if the search were not promptly executed.

I find that defendants' allegation that the officer securing the warrant recklessly disregarded the truth in his affidavit by omitting relevant information concerning facts known to law enforcement officers is without merit.

The case cited by defendants in support of this contention, which held:

5-Findings and Recommendation

> " . . . where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to a finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Franks v. Delaware, 98 S.Ct. 2674, 2677 (1978)

in distinguishable. Franks addresses the issue of false statements knowingly and intentionally included in the affidavit, where such false statement was necessary to a finding of probable cause. The omissions noted in the December 31, 1979 affidavit of John S. Ransom, Esq. were not necessary to a finding of probable cause. The facts alleged to have been omitted were not material and their inclusion or omission would not have had any bearing on the existence of probable cause.

Defendants also contend that the search warrant was invalid because it was not obtained in compliance with the requirements of Federal Rule of Criminal Procedure 41, in the following particulars:

1) Application was not made by federal law enforcement officers or a United States Attorney;

2) The warrant was not directed at a civil officer of the United States; and

3) The warrant did not designate a federal magistrate to whom it should be returned nor was it returned to a federal magistrate.

The requirements of Fed. R. Crim. P. 41 must be met or noncompliance must be explained when it is shown that the participation of federal officers in the investigation was "so pervasive" that it was in reality a federal investigation and thus a "federal warrant." United States v. Burke, 517 F.2d 377 (2nd Cir. 1975); Navarro v. United States, 400 F.2d 315 (5th Cir. 1968). The participation of DEA agents in the case at bar leaves no doubt that the investigation was

sufficiently "federal" as to require compliance with Fed. R. Crim. P. 41 or a sufficient explanation for noncompliance.

I find that the January 17, 1980 affidavit of Richard Wisenor is credible and indicates that obtaining the state warrant was done in good faith and not with the intention of avoiding the operation of the federal procedure.

Failure to comply with the requirements of Fed. R. Crim. P. 41 does not necessarily dictate the suppression of the evidence. Suppression is appropriate where there is "prejudice" in the sense that the search might not have occurred or would not have been so "abrasive" if the rule had been followed, or where there is evidence of an intentional and deliberate disregard of the provisions of the rule. United States v. Burke, supra; United States v. Radlick, 581 F.2d 225 (9th Cir. 1978).

The record indicates that there was no "forum shopping" or deliberate avoidance or disregard of Fed. R. Crim P. 41. Nor has any prejudice been shown. A state court judge had the authority to issue the warrant; the actual period of return was shorter than that allowed under the federal procedure; and search was not a nighttime search; and it was not conducted in an abrasive manner.

No prejudice has been shown and therefore failure to comply with Fed. R. Crim. P. 41 does not invalidate the search. A credible acceptable explanation for the federal officer's method of proceeding has been given.

Defendants' motion to suppress evidence obtained in the November 21, 1979 search of the residence located at 1475 S. E. Kane Street, Roseburg, Oregon should be denied.

DATED this 28th day of January, 1980.

Michael R. Hogan
U.S. MAGISTRATE

PHILLIP M. MARGOLIN
555 Oregon National Building
610 S.W. Alder Street
Portland, OR 97205
(503) 248-0731
Attorney for Defendant-Appellant Donald George Horton

JOHN S. RANSOM
Ransom, Rogers & Blackman
330 American Bank Building
621 S.W. Morrison Street
Portland, OR 97205
(503) 228-0487
Attorneys for Defendant-Appellant Mary C. Horton

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARY C. HORTON, Defendant-Appellant.	Supreme Court No. CA No. 80-1225, 80-1324
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONALD GEORGE HORTON, Defendant-Appellant.	STATEMENT OF EVIDENCE AND PROCEEDING MADE BECAUSE NO TRANSCRIPT AVAILABLE

Pursuant to Federal Rule of Appellate Procedure 10(c), petitioners Donald George Horton and Mary C. Horton, by and through their attorneys, Phillip M. Margolin and John S. Ransom, make the following STATEMENT OF EVIDENCE AND PROCEEDING MADE BECAUSE NO TRANSCRIPT IS AVAILABLE concerning events that occurred during oral argument before the United States Court of Appeals for the Ninth Circuit and occurrences after that proceeding.

On November 3, 1980, Phillip M. Margolin, attorney for

PHILLIP MICHAEL MARGOLIN
Attorney at Law
555 Oregon National Building
Portland, Oregon 97205
Telephone 248-0731

petitioner, Donald George Horton, and John S. Ransom, attorney for petitioner, Mary C. Horton, appeared in Portland, Oregon, before Judges Kilkenny, Van Dusen, and Hug of the United States Court of Appeals for the Ninth Circuit to present oral argument in the case of United States of America v. Mary C. Horton and Donald George Horton, CA Nos. 80-1225, 80-1324.

Phillip M. Margolin spoke first. He introduced himself as Mr. Horton's attorney and introduced Mr. Ransom as the attorney representing Mrs. Horton. Mr. Margolin then stated that he was going to address the question of the sufficiency of the search warrant affidavit and the issue of staleness and Mr. Ransom was going to discuss the Franks v. Delaware issue and the standard on review.

Mr. Margolin began to discuss the sufficiency of the affidavit. He was halfway through a sentence when he was interrupted by Judge Kilkenny. Mr. Margolin and Mr. Ransom have argued on numerous occasions before state and federal appellate courts. They have frequently been interrupted in the course of argument by an appellate judge who is asking a question concerning the issues raised on appeal. Judge Kilkenny's interruption was very different from the normal interruption.

First, Judge Kilkenny stated in a rude and angry manner that the case presented the clearest example of probable cause he had ever seen. He then proceeded to state, in an irate and irrational manner, that "It is lawyers like you" who clog the courts with frivolous appeals, or words to this effect.

Mr. Margolin has never met Judge Kilkenny outside of court and has never spoken to him except during the few occasions that he has

PHILLIP MICHAEL MARGOLIN
Attorney at Law
888 Oregon National Building
Portland, Oregon 97204
Telephone 248-0731

appeared before the judge during oral argument at the Court of Appeals. Despite the fact that Mr. Margolin and the judge have never met, the statement was a direct attack on Mr. Margolin's character.

Judge Kilkenny next harangued counsel for filing an appeal when "that woman is so guilty", or words to that effect. First, Mr. Margolin was representing Mr. Horton, a man, and had made that clear on two occasions before commencing the substantive part of his argument. Second, the issues before the court were strictly legal and the issue of guilt or innocence was not before the court. Finally, both counsel have filed briefs of dubious merit on behalf of criminal defendants as required by this court's holding in Anders v. California, 386 US 738 (1967). Neither counsel considers the appeal in the Horton case to be frivolous.

Judge Kilkenny's comments were intemperate, irrelevant, and constituted a tirade rather than a reasonable discussion of legal issues. The language made it clear that his opinion of the guilt of the appellants would affect his decision. Judge Kilkenny interrupted Mr. Margolin in this manner two or three times before permitting him to complete his argument.

On November 4, 1980, the day after oral argument, Mr. Ransom wrote the Court of Appeals to find out how he could get a transcript of the oral argument. [Ex. A] The Court wrote Mr. Ransom on November 10, 1980, and told him that no transcripts of oral argument are made, but that he could listen to the tapes in the clerk's office in San Francisco. [Ex. B]

Through a San Francisco law firm, Mr. Ransom arranged to have

PHILLIP MICHAEL MARGOLIN
Attorney at Law
555 Oregon National Building
Portland, Oregon 97204
Telephone 248-0731

a stenographer listen to the tape and make a stenographic record of it for use in a Petition for Rehearing or a Petition for a Writ of Certiorari. The stenographer went to the clerk's office at the Ninth Circuit Court of Appeals in San Francisco. There, she was informed by a deputy clerk that, "None of the tapes of the day of argument came out." "No tape is available."

This statement of the proceedings before the Ninth Circuit Court of Appeals and the occurrences that followed oral argument is made by counsel because the transcript that was made of the oral argument is not available on appeal. The statements set out above represent counsel's recollections to the best of their ability.

DATED: Jan 26, 1981

Phillip M. Margolin
Attorney for Defendant-Appellant
Donald George Horton

DATED: Jan 28, 1981

John S. Ransom
Attorney for Defendant-Appellant
Mary C. Horton

PHILLIP MICHAEL MARGOLIN
Attorney at Law
[illegible]
Telephone [illegible]

November 4, 1980

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
U.S. Court of Appeals and
Post Office Building
7th & Mission Streets
P.O. Box 547
San Francisco, CA 94101

Dear Mr. Deane:

Please advise me of the availability of either a transcript of oral argument or a copy of the recording of oral argument and the manner in which one obtains one or the other. Reference is specifically made to the oral argument in Portland, Oregon, before Judges Kilkenny, Van Dusen and Hug on November 3, 1980, in the case of United States v. Mary C. Horton and Donald George Horton, CA Nos. 80-1225, 1324.

Very truly yours,

JOHN S. RANSOM

JSR:dyu

cc: Phil Margolin

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Richard H. Deane
Clerk of Court

(415) 556-7340

November 10, 1980

RECEIVED
NOV 12 1980
RANSOM, ROGERS & BLACKMAN

John S. Ransom, Esq.
RANSOM, ROGERS and BLACKMAN
330 American Bank Building
621 S.W. Morrison St.
Portland, Oregon 97205

Re: U.S.A. v. Horton et al.
No. 80-1225, 80-1324

Dear Mr. Ransom:

I am writing in response to your letter of November 4, 1980.

No transcripts are made of oral argument before the Court. If you wish, you may listen to the tapes in the Clerk's office in San Francisco, or have someone come in to this office and transcribe the argument.

Very truly yours,

Richard H. Deane
Clerk of Court

Cathy A. Catterson

By: Cathy A. Catterson
Deputy Clerk

CAC/hs

APPX. B

SIDNEY I. LEZAK
United States Attorney
District of Oregon
JAMES L. SUTHERLAND
Assistant United States Attorney
Federal Building, 211 E. 7th Ave.
Eugene, Oregon 97401
687-6771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARY C. HORTON, Defendant-Appellant.	Supreme Court No. CA No. 80-1225, 80-1324
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONALD GEORGE HORTON, Defendant-Appellant.	APPELLEE'S STATEMENT OF OBJECTION OR PROPOSED AMENDMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 10(c)

Appellants Mary C. Horton and Donald George Horton have submitted to the undersigned a statement of evidence and Proceeding Made Because No Transcript is Available. The statement is made purportedly pursuant to Federal Rule of Appellate Procedure 10(c). The Government questions whether or not Federal Rule of Appellate Procedure 10(c) is applicable to this proceeding. Rule 10(c) contemplates a record at the District Court level, and the District Court judge settling the transcript.

In the event that Federal Rule of Appellate Procedure 10(c) is the appropriate rule for these proceedings, the Government responds with objections and amendments as follows:

The Government is in agreement with the first paragraph, page 1, lines 19 through 25.

Form OBD-183
12-8-78 DOJ

2. The Government is in agreement with paragraph 2.

3. Mr. Margolin did speak first. He did introduce himself. The Government is in agreement with paragraph 3.

4. Mr. Margolin was interrupted by Judge Kilkenny shortly after he began his presentation. The Government has no knowledge of whether Mr. Margolin and Mr. Ransom have argued on numerous occasions before state and federal appellate courts. The Government has no knowledge of whether or not Judge Kilkenny's interruption was different from the normal interruption.

5. It is the undersigned's recollection that Judge Kilkenny commented on appeals clogging the court's docket. I am unable to recall whether there was language to the effect "It's lawyers like you". This may have been said. I have no recollection.

6. The Government has no knowledge of whether Mr. Margolin had ever met or spoken with Judge Kilkenny before. My impression of Judge Kilkenny's questioning was that it was not a direct attack on Mr. Margolin's character.

7. I do recall Judge Kilkenny indicating words to the effect that "the woman is so guilty". The issues before the appellate court are adequately described in the appellate briefs.

8. The Government is unable to comment on the next paragraph in that it would require an interpretation of Judge Kilkenny's thought and mental processes.

9. The Government has no knowledge of any of the remaining matters.

It is my recollection that Judge Kilkenny did reflect and develop the argument that if the affidavit in question contained information from which the Magistrate could reasonably infer probable cause, that the affidavit was sufficient. The Government's recollection is that Mr. Margolin agreed that the Magistrate could make reasonable inferences, but that he questioned whether or not there was sufficient information to make reasonable inferences.

Form OBD-183
12-8-76 DOJ

It is the Government's recollection that the remaining judges on the panel did not ask many questions of Mr. Margolin. Mr. Ransom's presentation was brief. The Government then asked if the court had any questions. The Government then commented on one point to which a judge, other than Judge Kilkenny responded. The Government concluded its presentation, and the court asked Mr. Margolin and Mr. Ransom if they wished to respond to the Government's point.

DATED this _____day of February, 1981.

SIDNEY I. LEZAK
United States Attorney



JAMES D. SUTHERLAND
Assistant United States Attorney

Form OBD-183
12-6-76 DOJ

IN THE DISTRICT COURT OF THE STATE OF OREGON FOR DOUGLAS COUNTY

STATE OF OREGON)
) ss. AFFIDAVIT FOR SEARCH WARRANT
County of Douglas)

I, John Hodgson, being first duly sworn on oath, depose and say:

(1) That I am and have been a police officer for 4 1/2 years and am now employed by the Roseburg Police Department (Agency), as a Detective - Corporal (Rank or Position).

(2) That I have reason to believe and do so believe that Mary Horton, has property, to-wit: Cocaine, Records of sales or purchases of cocaine, drug paraphernalia

which is now being concealed ~~(on the person of)~~ ~~(and)~~ (on the premises known as) ~~(and)~~ ~~(in an automobile which is described as)~~ 1475 S.E. Kane St., a single story, wood frame dwelling house, green in color, reached by going up a private driveway approximately 1/4 mile in length

located in Roseburg, Douglas County, Oregon, which property is (evidence concerning the commission of a criminal offense) (contraband) (fruits of a crime) (the instrumentality of a crime).

(3) That my belief is based on the following facts:

That on August 17, 1979, I arranged for Gerald Bishop, a special agent of the Federal Drug Enforcement Administration, hereinafter referred to as Bishop, to go to the residence at 1475 S.E. Kane St. where I know Mary Horton to reside. I watched Bishop drive up to the Horton residence, observe him enter the residence, saw him leave the residence and then met him at the Windmill restaurant parking lot. He showed me a white powdery substance which he said he had purchased from Mary Horton at her residence that day. He further told me that Mary Horton represented this substance to be 1 ounce of cocaine and that he paid $245 for the cocaine. That during my observations referred to above, agent Richard Wisenor (of the Federal Drug Enforcement Administration) was with me. Agent Wisenor took the substance. Wisenor has told me that he sent the substance to the Western Regional Laboratory of the Drug Enforcement Administration. I have been advised by Mr. Wisenor that said substance was analyzed by said Laboratory and determined to be cocaine.

That on October 28, 1979, I was contacted by Wisn. who told me that Bishop had arranged for another purchase of cocaine from Mary Horton. He told me Bishop was to fly into the Roseburg Airport and while there meet with Mary Horton and purchase the cocaine. That agent Wisenor contacted me the evening of October 28, 1979 and related to me that on Oct 28 he and fellow agent Roger Milea had kept Mary Horton

usual surveillance. He told me that Horton left her residence at approximately 9:30 PM and arrived at the airport at approximately 9:40 P.M. and met with Bishop. She left the airport shortly thereafter. Wisenor told me he met with Bishop immediately after Horton left the airport and that Bishop gave to Wisenor approximately 2 ounces of cocaine for which he (Bishop) had given Mary Horton $4800. Wisenor told me this substance was sent to the same Lab in San Francisco as mentioned above and has been notified that the substance is, in fact, cocaine. That Roger Miles, mentioned above, told me he followed Horton from the airport and that she went directly to her residence at 1475 S.E. Kane.

That on November 20, 1979, agent Bishop called me and said that he was in Seattle, Washington and that he had arranged to make a purchase of approximately 12 ounces of ~~not~~ cocaine from Mary Horton on November 21, 1979, in Roseburg, Oregon. That the purchase price was set at $3300 per ounce. That today, November 21, 1979, I have spoken with agent Wisenor who told me that ~~at~~ this morning of November 21 he had spoken with Bishop and Bishop said he had talked with Mary Horton this morning of November 21 and Bishop told Wisenor the following: He will be flying into the Roseburg airport at approximately 2:00 PM; That he is to go from there to the Windmill Restaurant and meet with Mary Horton and that she is to deliver to him approximately 14 ounces of cocaine.

That the residence at 1475 S.E. Kane is a single story wood frame dwelling house, green in color, reached by going up a private driveway approximately 1/4 mile in length.

(4) That the search for and recovery of said property is necessary to determine the existence and extent of the commission of a criminal offense and the search and recovery is necessary for the prosecution of said criminal offense.

(5) That this affidavit is made for the purpose of securing a search warrant directed to the Roseburg Police Department (Agency).

(6) ~~That I am requesting a night-time search. (This should be stricken if the facts do not justify a night-time search.)~~

John R. Hoffa
(Signature of Affiant)

SUBSCRIBED AND SWORN to before me this 21st day of December, 1979.

District Judge